



Serving the People of California

INFORMATION SHEET

SALESPERSONS

A salesperson is an individual engaged in the selling of merchandise or services. The salesperson can be a common law employee, an independent contractor, or an employee by specific statute.

Who is an Employee Under the General Common Law Rules

An employer-employee relationship exists when a person hires an individual to perform services and has the right to exercise control over the manner and means by which the individual performs his or her services. The right of control, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control.

Other factors to be taken into consideration are:

1. Whether or not the one performing services is engaged in a distinct occupation or business.
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal or by a specialist without supervision.
3. The skill required in the particular occupation.
4. Whether the principal or the person supplies the instrumentalities, tools, and place of work for the person doing the work.
5. The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
6. The method of payment, whether by the time or by the job.
7. Whether or not the work is a part of the regular business of the principal.
8. Whether or not the parties believe they are creating the relationship of employer-employee.
9. The extent of actual control exercised by the principal over the manner and means of performing the services.

10. Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

11. Whether the worker can make business decisions that would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time is not sufficient to show a risk of loss.

The enumerated factors above are evidence of the right to control. A determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed, rather than depending on a single controlling factor.

Salespersons as Common Law Employees

In its Precedent Tax Decision No. P-T-346, the California Unemployment Insurance Appeals Board held the following circumstances were indications of employment:

- The salespersons received training.
- The salespersons were assigned quotas.
- The salespersons were required to follow leads.
- The salesperson furnished reports.
- The salespersons attended sales meetings.
- The salespersons were given expense allowances or a guaranteed salary.
- The salespersons performed services of a continuous nature.
- The salespersons' services were a direct and essential part of the business operation.

However, where the salespersons paid their own expenses, established their own hours of work and itineraries of travel, were not required to attend sales meetings or make reports, and the only direction from the principal consisted of establishing selling prices, terms and conditions of the sale, approval of credit, and furnishing samples, literature or order blanks, the

salespersons were determined to be independent contractors.

The following is an example of salespersons who were determined to be independent contractors where there were no indications of the existence of a right of control (Precedent Tax Decision No. P-T-346):

The salespersons maintained their own offices and showrooms and paid their own expenses. They belonged to salesperson's organizations which promoted sales shows several times a year. All expenses in displaying and selling the petitioner's merchandise at these shows were borne by the salespersons. However, one of the salespersons occasionally used the principal's showroom and the principal's office facilities were available to him.

Retail Salespersons

Retail salespersons are individuals engaged in the sale of goods or commodities directly to the consumer. Typically, they are under the direction and control of the principal and are employees of that principal. Retail salespersons may be remunerated by commission, salary, or by the hour. They typically perform services at any retail establishment such as a department store, automobile showroom, etc.

Telephone Solicitors

Telephone solicitors are individuals engaged in the sale of goods or commodities directly to the consumer through the use of the telephone. Typically, they are under the direction and control of the principal and are employers of that principal. Telephone solicitors may be remunerated by commission, salary, or by the hour.

The following is an example of telephone solicitors held to be employees of the principal (Tax Decision No. T-86-64):

The telephone solicitors performed their services at the principal's place of business. The principal provided the telephones and desks. Sales leads were provided by both the telephone solicitors and the principal. The telephone solicitors were remunerated by commission. The telephone solicitors set their own hours between the principal's business hours of 8 a.m. to late evening. The telephone solicitors performed their services

on an off and on basis as desired. The telephone solicitors identified themselves as representing the principal. Some of the telephone solicitors performed services for other businesses.

Does "Employee" include Agent or Commissioned-Driver and Traveling or City Salespersons?

To determine if an agent or commissioned-driver, or a traveling or city salesperson is performing services as an employee, it first must be determined whether the driver or the salesperson is an employee under the general common law rules. If the driver or the salesperson is determined not to be an employee under the general common law rules, a salesperson may still be an employee by statute if it is contemplated that substantially all of the services are to be performed personally and under either of the following conditions:

1. As an agent-driver or commissioned-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for his or her principal.
2. As a traveling or city salesperson, other than as an agent-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his or her principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

However, a driver or a salesperson is not an employee by statute if he or she has a substantial investment in facilities used in connection with the performance of services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

If the services of an agent or commissioned-driver, or a traveling or city salesperson is that of an employee by statute, the driver or the salesperson's wages are subject to Unemployment Insurance (UI) contributions, Employment Training Tax (ETT), and the withholding of Disability Insurance (DI) contributions. California Personal Income Tax (PIT) withholding is not required.

The following is an example of a salesperson who was determined not to be an employee under the general common law rules from facts not stated, but was an employee by statute:

Salesperson A's principal business activity is the solicitation of orders from retail pharmacies on a continuing full-time basis on behalf of the X wholesale drug company. A does, however, occasionally solicit orders for drugs on behalf of the Y and Z companies. A's contract of service with the X company contemplates that substantially all of the services to which the arrangement relates are to be performed by him personally and he has no investment in facilities other than in an automobile.

Sideline sales activities would not overturn the "full-time" relationship with the salesperson's principal. The California Unemployment Insurance Appeals Board has held that a salesperson who spends eighty (80) percent of his or her time selling for one principal is engaged on a full-time basis. (P-T-329)

Salespersons and Brokers Whose Services are Not in Employment.

The services of real estate, mineral, oil and gas or cementary brokers or real estate, cementary or direct

sales salespersons who are employees under common law rules are excluded by statute from UI, DI, ETT, and PIT coverage if the salesperson is an employee and all of the following conditions are met:

1. The salesperson is licensed under specific provisions of the Business and Professions Code or is engaged in the business of primarily in-person demonstration and sales of consumer products (including services or other intangibles) in the home or sales to any buyer for resale in the home or otherwise than from a retail or whole-sale establishment.
2. Substantially all of the remuneration for the services is directly related to sales rather than to the number of hours worked.
3. The services are performed under a written contract expressly providing that the individual will not be treated as an employee for state tax purposes.

Please contact the nearest Employment Tax Customer Service Office if you have any further questions regarding this information sheet, salespersons, or employment.

Equal Opportunity Employer/Program. Auxiliary services and assistance available to persons with disabilities. TDD Users, contact the California Relay Service: 1-800-735-2929.